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What Kind of Law Making in a Global World? The Case of Africa

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I. INTRODUCTION

When I was considering the main topic assigned by the organizers of the symposium, i.e., law making in a global world, a preliminary question jumped to mind: How relevant is the reference to a global world—is it just a gratuitous reference to an intellectual fashion of the day? Literally speaking the adjective "global" refers to something that "embraces the totality of a group of items."[1] But, on the one hand, since, in this instance, it qualifies the world (isn't global coming from globe and, accordingly, this juxtaposition tautological?), it may leave us a bit perplexed about the exact nature and extent of the items embraced. Are we really concerned about the law making of a global law applicable to the whole planet? On the other hand, when I look superficially at what appears to me and around me today when one refers to the global world, I tend, although for different reasons, to see myself as lonely as the savage in Aldous Huxley's *Brave New World*.[2]

Yet one thing seems obvious to me: The organizers of this symposium never pretended that they would limit themselves to law making with the purpose of embracing a universal regulation of some legal field or another. Quite on the contrary, the organizers left the participants free to tackle different subjects that reflected the participants' own interests and left the difficulty of opening and concluding remarks to Professor Moréteau. Being reassured on the discretion the participants possessed in choosing their topics, I chose to abandon the original draft of my article that merely reflected my perplexity and lack of inspiration during the weeks preceding the symposium.

My perplexity resulted from the uneasiness I felt with the idea that we had to govern our thinking along the lines of law making in a global way, a view some lawyers believed (and some still do) fifty years ago when Louis B. Sohn and Grenville Clark published

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1. William Little et al., THE SHORTER OXFORD ENGLISH DICTIONARY 858 (C.T. Onions ed., The Clarendon Press 1973) (1933).

2. Aldous Huxley, BRAVE NEW WORLD (1932).

their *World Peace Through World Law*.[3] Having personally known Professor Sohn and having had the privilege of hosting him in a conference I organized, I can only wonder today how it was possible for a scholar of such magnitude and experience to seriously defend such an idea. If Louis B. Sohn, from wherever he is today, is unfortunate enough to see the world he dreamt of half a century ago, he would see only that war rather than peace embraces far too many countries of the world.

This is especially true of the continent where I was born and where I have spent roughly a third of my life: Africa. It is a continent where legal globalization has apparently only brought havoc. But the case of Africa provides a good illustration of the catastrophic impact globalization may have on wide segments of the world's population. The main one, in the socio-economic field, is pauperization—a topic on which Professor Banakas has so eloquently spoken and written during this symposium. When compared with the impact of economic globalization, legal globalization may seem negligible. Yet I thought what had happened for a century or so and is still happening in Africa could perhaps have global value and teach the apprentice sorcerers a lesson if they are ever inclined to be taught anything.

Globalization is an ongoing process that has been underway for years, decades, centuries, and possibly even millenaries. Didn't the Romans once believe they were ruling the universe of their time? Yet they were careful not to think of their law as global. At the threshold of the so-called modern times (not those of Charles Chaplin), didn't Austria consider its destiny "to command the universal orb" (*Austria Est Imperare Orbem Universum*)? Yet Charles V never contemplated legislating for his whole empire. And, in the nineteenth century, wasn't Britannia ruling the waves, i.e., seventy percent of the Earth and some pieces of land too? Yet Victoria, *Regina Imperatrix*, ruled the empire through many municipal laws that only had to reflect, as near as may be possible, those of Great Britain or, in most cases, England. All these claims were part of common political bragging and one may wonder whether or not this is still the case today when media tycoons claim that billions can see "as if they were there" (and even better) the World Cup soccer finals or the Olympic Games, not to mention Malibu or General Hospital. One thing seems sure: They encourage sociologists to declare that media rules the world.

This claim, again, is arguable. Isn't the control of media only one aspect of financial globalization and one of the most powerful

3. Grenville Clark & Louis B. Sohn, WORLD PEACE THROUGH WORLD LAW (1958).

tools in the hands of those who advocate it? This crude fact may lead some among us to deny nearly any role to law in the shaping of human destiny, to lose interest in the development of our discipline, and to seek refuge in the fascinating technicalities and mechanisms that highly developed laws offer. The opposite view—held by Professor Banakas, myself, and many others—finds that in order to reduce the impact of financial globalization on the current lives of so many people, we must plead for the joining of resources of all those who believe that justice is a dominant value implied in anything legal.

This being said and admitting that every embrace of the totality of a group of items—in my case, those coming under the three letters of the word "law"—is highly relative, I would like to consider the production of law as a global phenomenon from the world-level down to that of the State. In a way and in its positivist approach, the law globalizes when it tends to embrace the whole field of law making.

But, assuming it is feasible consensus-wise, is a global approach to law (1) an irrepressible necessity and (2) not conducive to losses far outweighing its benefits?

Considering first the necessity question, I am puzzled by an apparently contradictory movement that dates back roughly (please let us not quarrel about dates) to the last quarter of the twentieth century, i.e., the one that, in Europe, is characterized by a widespread movement towards decentralization, regionalism, autonomy, and federalism. No wonder the Swiss were so interested in this movement—their confederate system certainly represented and still represents the paradigm of this movement. Accordingly, they launched some twenty years ago a EURO-Régions summer university,[4] which still runs today.[5] The project was strongly supported by the Council of Europe,[6] which was heavily committed to the regional, cultural, economic, political, and social identities within the limits of Europe. This is certainly not a reflection of any unanimity as to the absolute necessity of globalization since the focus is only in the European field. On the contrary, the idea behind the program was to foster the Council's initiative to develop highly specific, trans-border, interstate, and regional cooperation. Of course the Council does not have the

4. *See* Institute of Federalism, http://www.federalism.ch/ (last visited Mar. 21, 2007).

5. I was one of its founding members and am still one of its two honorary members.

6. *See generally* Council of Europe, http://www.coe.int/ (last visited Mar. 21, 2007).

means possessed by the former European Community or the present Union, and its action is far less renowned than that of the latter.

Parallel to these institutional aspects, it seems that in some countries there has emerged, in the course of the last fifteen years or so,[7] a desire of the people to play a greater role in the making of the law that governs their daily lives. Although law making can still, in many places, be controlled by the courts, this tendency—of which a most apparent manifestation comes under the general idea of "mediation" (replacing that of adjudication)—reflects an increased will of individuals to take an active part in the settlement of their possible social conflicts and in the making of their own law. It also contributes to a pluralist approach to law and society and the will to take into consideration the legitimate expectations exercised by concerned individuals.[8] It ultimately leads to critical or radical legal pluralism in which law can be—independently from the multiple other forms it may take, including State law—what every individual thinks it to be. How are such movements in tune with the paradigmatic vocation of thinking that law must be conceived in a global way? Or are these movements signs of a real reaction against the excesses of the "classical" views according to which there is either only one law, that of the State (or—why not?—a truly "global" law, serving their interests), or only institutional or contractual law makers operating side-by-side with the State? This is not the place to discuss this problem to which Professor Macdonald, one of the symposium participants, has devoted many of his recent seminal contributions.

Turning now to the point of establishing an adequate balance between benefits and losses for the populations concerned, the questions are fairly simple. Has the existing legal framework to align itself with the indifference towards the unbearable misery prevailing on some continents and with the increasing inequalities that are slowly but constantly growing in Western Europe or northern North America? Has it to be satisfied with the quite unsatisfactory condition of an increasingly sizeable part of the populations of some countries? Unfortunately, these frightful numbers tend more and more to be considered as statistical data without any human significance. One is led to believe, as in the

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7. *See* J.-P. Bonafé-Schmitt, MEDIATION ET REGULATION SOCIALE: APPROCHE COMPARATIVE FRANCE—USA—GRANDE-BRETAGNE (1992). *See also* SOURCES ET INSTRUMENTS DE JUSTICE EN DROIT PRIVE 141 (N. Kasirer & P. Noreau eds., 2002).

8. *See* Carole Younes & Etienne Roy Le Roy, MEDIATION ET DIVERSITE CULTURELLE: POUR QUELLE SOCIETE? (2002).

colonial period, that other parts of the world must go through all the evils and sufferings experienced in Europe or northern North America if these other parts of the world are to reach the same level of material development as Europe and northern North America. Such is "the nature of things" in a perverted use of history. An obvious or insidious growing of social or human underdevelopment ultimately seems to be the only convincing result of economic globalization—necessarily expressed through one-way trade statistics, the suppression of local economies, the size of container-carrying ships, and the growing number of billionaires—and as the only way of raising the average per capita income of millions of people. Is it that which the makers of tomorrow's law wish to passively reflect? And is it on such cultural, economic, political, and social havoc that they will contribute as lawyers to a more globally just world?

Had it not been for Professor Banakas's firm and articulated stand, I would have been willing to admit that I was just a relic of a distant past when led to believe that law should also mean and foster, even in a minimal way, social justice. Thank you, Professor Banakas, for having allowed me a respite.

II. THE CASE OF LEGAL GLOBALIZATION IN AFRICA

For more than a century, Africans (after all isn't it they, individually and socially, who have borne the brunt of the impact of globalization?) have been subjected to the global influence of various concepts that the European (and later the North American) nations have unilaterally decided to give universal value.[9]

A. The Continent as a Whole

First, there is an elementary idea among lawyers that Africa is a whole without any distinction, except for the distinctive physical traits of its people, i.e., the color of the skin. There was accordingly a "black" Africa, which geographically covered part of the continent and spread from the southern limit of the Sahara Desert to the Cape of Good Hope. Within these limits, so-called "black" Africa would know of only one law, i.e., African law. This would ignore the huge differences between the laws of either

9. In an approach totally different and, in some places, carrying things erroneously to extremes by lack of his personal documentation and experience on huge parts of African scholarship and realities, see W. Menski, COMPARATIVE LAW IN A GLOBAL CONTEXT—THE LEGAL SYSTEMS OF ASIA AND AFRICA 380 (2006).

people practicing agriculture, commerce, fishing, gathering, hunting, and pasturing, or societies having adopted as their mode of government various forms of political regimes, be they that of the lineage or that of some kind of pre-State structure.

One presumed that these different forms of economic or socio-political organization could function under a single legal system. But this globalization with reference to the laws of a continent obliterated the specific identities of the cultures concerned under a color of the skin. The latter, in turn, sent back, knowingly or not, to the malediction of Cham as it appears in the founding myths of the Judeo-Christian tradition, which subsumes the current laws of Europe or of European origin throughout the world. As a result African law necessarily belonged to an even wider and more globalizing category, that of "primitive" law, which was widely accepted until the mid 1950s.[10] For many,[11] it meant that Africa at large still had a long way to go in order to get "civilized"—from the age of stone to that of the atom.

The concept of "civilization" is the second globalizing concept that was imposed upon African cultures and laws. In order to become "civilized," Africans and their laws had to give up all mechanisms linked to the prevalence of social harmony for the benefit of the adjudicatory legal process favored in Europe. In many if not most African societies where there is reliable information available on this topic,[12] what is considered by American and European legal systems as a criminal offense is in African laws a strictly private matter that can be solved through various mechanisms ranging from apologies to compensation of some kind or another. Society as such does not appear in the process through any kind of prosecuting or punishing device. It only intervenes for what is considered a real offense to social order, such as offenses against socio-political authorities, evil witchcraft, and recidivism to the extent it becomes a social nuisance. Thus what Americans and Europeans would consider justification for authorities to intervene, e.g., accidental wounding or even the killing of a person, remains a strictly private affair in Africa. The focus in Africa is on the conduct of a member of society that disturbs another member and possibly endangers the necessary harmony that society needs to survive. In such a

10. See the remarkable book of an exceptional legal anthropologist, E. Adamson Hoebel, THE LAW OF PRIMITIVE MAN (1954).

11. But not for Hoebel in his book quoted in the previous note.

12. This is an important caveat as many aspects of African legal systems are still better unknown than known.

situation, what is important is the injured party's acceptance of this conduct and the subsequent reestablishment of harmony.

The case decided before the court of Gikongoro in post-colonial Rwanda clearly illustrates this dilemma.[13] A boy and a girl spent the evening at a dance. Both were a bit tipsy and at the end of the party the boy asked the girl to sleep at his place and offered her money to do so. She refused, but he insisted. They began to push one another, and, suddenly, under a push, she fell badly from her chair and died instantaneously. The boy was criminally indicted for having caused her unintentional death, and the public prosecutor was required to punish him in accordance with the Penal Code. As the time for pleadings came, the fathers of both youths explained to the court that what had happened was a most unfortunate event in which no one has any real responsibility. They said that sending the boy to prison would help no one, especially the girl's family who had been fully compensated according to custom and held no grudge whatsoever against the boy and his family. They accordingly asked for an acquittal of the boy. The answer of the court was terse. According to the (imported) Code of Criminal Procedure, the parties could not take legal action once an indictment was decided. The facts were clear and the boy had to incur punishment for his actions. Thus the court sentenced him to a suspended detention in jail and a heavy fine.

Reading this case, I cannot help wondering where the "civilized" law lies. This is just one among innumerable cases in which an imported, exogenous, "civilized" system wipes out a fundamental characteristic of an endogenous and truly African legal system. What is more surprising is that elimination of the primacy of social harmony comes at a time where, in Europe, we rediscover the virtues of mediation and solutions to litigation built by the parties themselves.

This brings me to one of the elements underlying the will to restore the seamless web of societies, which has been greatly modified by the intrusion of outside worlds. This element is the full understanding by the parties concerned of the reasons for a disturbance of peace and the commission of a delictual or criminal act that harms a fellow member of society. The assumption is that if one fully realizes why the natural state of peace, which society needs to survive, has been disturbed, one will be able, through education, to avoid similar incidents in the future. This is a lengthy and global (at the level of society) process that takes time and involves everyone in the community. The process will

13. 11 REVUE JURIDIQUE DU RWANDA 535 (1987).

necessarily end when the wrongful party acknowledges the nature of his act by compensating (possibly symbolic, but more often quite valuable) the victim and restoring the normal web of social relations in the society concerned. This essential element is reflected in the name given in South Africa to the commission entrusted with the task of restoring harmony after the terrible apartheid period: truth—as all parties have to fully understand the reasons why it could happen—and reconciliation—as all South Africans have to live together and build a new harmonious South African society.

This may seem idyllic, but it does not mean that pre-colonial societies were without punishment. Quite on the contrary, punishment existed (and still exists) and was (or is) often harsh. But it was applied only to cases in which (1) the tearing of the seamless web was such that it amounted to an offense, i.e., so grave that society had to intervene because the restoration of harmony was not achievable by the common will of the parties or (2) the repeated tearing of the web proved to be an incapacity of the person who caused it to change his conduct, thus endangering social life in a serious manner. As Hoebel clearly shows through examples,[14] law had teeth and those teeth could bite. One could also argue that such a way of considering the legal process is impossible because of the conditions of "modern" life. Yet the example of the above-mentioned case in Gikongoro (and many others I could mention) proves the contrary. The technique is also used in the worst possible conditions, i.e., in modern cities of North America, such as Toronto where it is applied to delinquent, uprooted, aboriginal youth with considerable success. It has been shown that such procedures lead to a highly favorable percentage of non-recidivism (up to eighty percent), while the usual criminal procedure and its usual punishment end up with seventy percent of recidivism.[15]

The relevance of the above considerations to the topic of globalization becomes clearer upon examination of the developing work of the International Criminal Court in The Hague and, in particular, the first cases that addressed situations arising in Africa. A personal contact with the judges of the court and its ancillary personnel—especially those of African origin who had had an opportunity to approach victims or witnesses of serious crimes—led to the confirmation of a personal conviction: the latter would not be satisfied with sentencing the culprits to jail term in a foreign

14. Hoebel, *supra* note 10.

15. *See* Craig Proulx, RECLAIMING ABORIGINAL JUSTICE, IDENTITY AND COMMUNITY (2003).

country however long it may be. Of essential importance in their eyes would be not only understanding why these people behaved in a most horrible way—understanding would, in a way, be to know the complete truth about the unbelievable—but also coming to peace with their shattered ideas about harmony in society and reconciling this knowledge with a part of their self: their conception of social life. Without satisfying that requirement of the victims, the decisions of the International Court would satisfy the exogenous public opinion but would be totally foreign to the victims; accordingly, "truth and reconciliation" would never be possible. Also notice that there is, in such processes, no mention of either fault or pardon; these are imported exogenous concepts closely linked to the founding myths of Christianity. These concepts were brought into Africa by missionaries, but conversions did not necessarily entail the disappearance of deep-rooted values, which for Africans goes back—as they do for Europeans or North Americans—to the founding myths of their civilizations.

This kind of "global" outlook at the laws of Africa (and most of the rest of the world even if it was difficult to call it uncivilized when one thought for a minute about what, for example, Asia, from Mecca to Kyoto, brought to civilization) seems to be a permanent feature of European and North American lawyers when, in the early 1900s, they were propagating the credo of civilization to the so-called "savage" or "primitive" populations of Africa, America, or Asia, wherever those populations had come under their domination. At the beginning of the second half of the century, with the accession of many colonies to independence,[16] the fertile mind of former colonial lawyers invented the most useful substitute for "legal development"[17] in order to carry out their role as mental colonizers in neo-colonial legal systems. This substitute I first encountered in Kinshasa in the early sixties when, as Secretary General of the Chamber of Commerce and Industry, I was closely associated with the successive attempts to prepare an Investment Code for the Congo. Which African country has not had its successive investment codes during the times that followed independence? And in which country did any of these codes bring true economic development, as opposed to an increased servitude to capital?

Contrary to some of my colleagues, I did not believe in legal engineering as a panacea for the development of harmonious

16. Absent from the process were the Asiatic non-colonies of Russia.

17. When I was seconded to Haile Selassie I University in Addis Ababa in the mid-1960s, one of my tasks was to establish there a centre for African legal development.

societies, especially when the law came from (1) the outside world and from (2) the top down to the people concerned. Such belief is founded on a good dose of empirical observation of what happened around Africa during the last half-century. Total failure and even an aggravation of existing situations have been and still are the results of the import of exogenous concepts considered as "global" concepts. Needless to say, such experiences contributed heavily to the development of my pluralist conception of law.

From the point of view of this symposium, the developmental approach of former colonial laws was more "global." This approach exceeded the Belgian, British, French, Portuguese, or Spanish conceptions of where those people, who were subjected to the colonial laws, were supposed to go. The failure of the developmental legal theories was parallel to the growing underdevelopment of the countries involved. But lawyers who are determined (in French, one would say stainless) in their conviction may prove that they hold the key to progress and wisdom. Hence there is the present tendency to impose in a subtle but forceful way values, such as democracy, structural adjustment, good governance, and accountability, as a condition for outside international support and any "assistance" that could be provided to countries in crisis. Do lawyers supporting that global view of international decency ever look at the situation in their own countries and at the way their governments treat some of their own fellow citizens or respect the rule of law?

Of course paying some kind of lip service to these prevalent "global" doctrines can be fruitful in many ways. The funding for persons or institutions often cannot be dissociated from an adhesion to such doctrines when one is interested in international cooperation. When confronted with the dilemma, it is up to each individual conscience to make a choice that—we all know—can be a very difficult one.

Finally, the importation of exogenous concepts of law and the molding of young local lawyers on the model of their civil or common law counterparts have produced a generation of women and men completely divorced from their fellow countrymen and countrywomen. The latter distrust and reject the kind of justice that mimics what its servants have been led to believe must be the universal look of the law. They appear as a predating class, closely associated with colonization and neo-colonization, propagating in the universities and administering, in and around the courts, a law on the books that is part of the global law some experts dream of in international organizations' offices. As a result, they are more and more rejected by the populations as "foreigners." As one of the

best British experts on Ghana writes with a traditional academic restraint in his language:

> [I]t is to be expected that the legal profession will exist as a socially distinct category somewhat alienated from other sections of society. There is, moreover, much evidence that lawyers, even when respected for their wealth and power, have also long been regarded with hostility for their professional practices.[18]

And, in that case, when a "populist" revolution happened in Ghana in the early 1980s, many lawyers were practically forced into exile due to a reaction against them much stronger than simple disaffection.

Looking at the resulting collapse of State justice in many places, one should not believe that Africa has turned lawless. Quite on the contrary, it offers in the countryside or towns many remarkable examples of legal pluralism. People organize, at various levels, a diversity of systems the function of which is to satisfy their need for justice. All sorts of existing social bonds, whether administrative, familial, local, professional, religious, or traditional—just to mention a few—are capable of replacing a failing State administration of justice.[19] As for the law applied, it is clear that it may be infinitely diverse and of all origins. Its essential feature is that it represents an acceptable rule for the judicial game to be played in the mind of all participants in order for a common feeling of justice to be satisfied. What the people are calling "laws" truly are laws.

Complementary to these spontaneous mechanisms, some welcome initiatives tend to restore a dialogue between the estranged "elites" and the common folks. This is the case for a project organized by the Afrika-Studiecentrum and two other research centers in the Netherlands, all parts of the University of Leiden. The project was initiated and directed by Dr. G. Hesseling, a legal anthropologist of great reputation, in conjunction with the two faculties of the University of Bamako (Mali), that of Arts and of Law. Seven Malian teachers of law were selected for the project and, after a basic training in anthropology, they were sent for a period of anywhere from six weeks to four months to do fieldwork in rural administrations or areas. There they studied

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18. G. Woodman, KNOWLEDGE OF STATE LAW IN GHANA: ASPECTS OF A THIRD WORLD SOCIAL ORDERING (1984).

19. *See* Marie-Claire Foblets & Filip Reyntjens, *Champs normatifs urbains en Afrique contemporaine* (Urban Normative Fields in Africa Today), 42 J. LEGAL PLURALISM 5 (1998) (examples from Kenya, Nigeria, and Zimbabwe).

problems that fell within the scope of their courses. For most of them, the experience was shattering as these quotations, among many others, reveal: "There is no question of living without the State, but of . . . reconciling the citizen with the State";[20] "the rule of law cannot materialize itself if it is not rooted in a law which is understood and accepted by all actors";[21] "the initiation [he has undergone] has provoked a tearing from what you have done until then and the integration of a new entity of which you will have now to carry the values";[22] his legal education and the one he has contributed to spread a "caricature-like, incomplete and even dogmatic vision of the law."[23] Each of the experiences described in the book are worth studying. They represent the beginning of the decolonization of young African lawyers, who were pushed far away from any globalizing temptation they could have had until then on the basis of their exogenous legal education.

What I have mentioned until now is *mutatis mutandis*, valid for the continent. But globalization, *lato sensu*, can also happen at the level of the State. Following up on what I have mentioned about African diversity, such diversity can indeed exist within the limits of a region or even within one single State as soon as a country has an average size in comparison to the rest of the continent. I will limit myself with one example, that of Ethiopia.

B. The State as a Whole

As the 1960s were nearing, Haile Selassie (the Power of the Trinity), the last Ethiopian emperor, decided that his country had to be a model in the context of the exogenous "development" doctrine, which was soon to engulf most African countries in the post-colonial era. In the field of law, the symbol of such "progress"—as he was told by his French advisers—could be none other than codification. Thus an ambitious project was launched that aimed at globalizing the various components of the museum of Ethiopian populations by providing it with six "national" codes: civil, commercial, criminal, maritime, plus civil and criminal procedure.[24] The drafting of each of them was entrusted to an expert: Professor David, the famous specialist of comparative law

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20. Gerti Hesseling et al., LE DROIT EN AFRIQUE—EXPÉRIENCES LOCALES ET DROIT ETATIQUE AU MALI 69 (2005).

21. *Id.* at 71.

22. *Id.* at 75.

23. *Id.* at 153.

24. An introduction to the Ethiopian codification is provided in Jacques Vanderlinden, *Civil Law and Common Law Influences on the Developing Law of Ethiopia*, 16 BUFF. L. REV. 250 (1968).

from Paris University. He became the "father" of the Ethiopian Civil Code. In a country that had rightly been called a museum of populations by a respected Italian social anthropologist, this was indeed a globalizing venture. All existing sources of law were declared ineffective when the Code came into force in 1960. The role of custom, which was the prevalent source of law for most populations of the "museum," was reduced to a strict minimum in cases where the Code expressly provided for its application, but even mentioning these few official outlets entailed the risk of being accused of "turning the legal clock back" on the road to modernity and development.

Needless to say the Code quickly became one of these many statutory instruments that were adopted in Africa following the recommendations of self-qualified experts trying to emulate David in his preparation of "precise and detailed rules" reflecting, as the emperor said in his preface to the Code, "the best legal systems in the world."[25] Hence the production of a patchwork of various legal provisions borrowed portions of the Egyptian, French, Greek, Israeli, Italian, Portuguese, Russian, Swiss, Turk (from the times of the Turkish Empire), or Yugoslav codes or laws, and, last but not least, the common law with the trust! These were totally foreign to the Ethiopian context and rendered extremely difficult, if not impossible, any reference by the users to the rationale of the adoption of one or the other set of provisions by the drafter. Furthermore, it was still sometimes difficult to reconcile the spirit in which some provisions operate, e.g., in the field of contracts where the overall setting is Swiss, but some specific provisions, e.g., on consent, are French. Finally, some provisions were so foreign to Ethiopian mentality that ministers and judges alike flatly declared that they should not be taken into consideration; this was the case, for example, with the imposition of a family name as a distinctive sign of identity for every Ethiopian physical person.

The Code also did not avoid the traps of multilingualism. Drafted in French, the Code had to be translated in English, the second de facto official language of the country, before a further translation in the official language of the country, Amharic.[26] In spite of the lip service paid for a time to the French version, it was clear that the Amharic version was the only one upon which to rely. The problem was that this second degree translation was abnormally weak, and, in some cases, David did not focus on the problems that could result from the successive translations of his

25. CIVIL CODE OF THE EMPIRE OF ETHIOPIA OF 1960, at v.

26. Amharic is the mother tongue of twenty-five percent of the population (the dominating Amhara ethnic group).

text. An example is the original article 1 of the Code, which reads: "La personne humaine est sujet de droit de sa naissance à sa mort," and becomes in English and then in Amharic: "The human person is subject of rights from its birth to its death." The French "sujet de droit" refers to law (i.e., rights as well as obligations) and not to rights as the English does. In fact the French expression has no equivalent in English and is foreign as such to the common law. The practical result was that Ethiopian students and lawyers would argue that a person had obligations under the Code, while it clearly said in the official language that it had only rights! This is but a simple example of the innumerable mistranslations that marred the text.

Finally, the Supreme Court of Ethiopia decided from the start[27] that some general principles were to prevail no matter how precise and binding the language of the Code might be. Even though article 881 provided that a public will "shall be of no effect unless it is read in the presence of the testator and four witnesses," no exception being allowed, the Court nevertheless decided that a will was valid with only three witnesses when the intention of the testator was clear. Such flexibility considerably reduced the care of David to deliver a code precise enough to avoid innumerable controversies based on facts.[28]

These examples illustrate the kind of global law making under which millions of people have felt estranged from their culture, decided to resort to laws other than their own, or suffered in the field of law. These examples also illustrate another point: The increase of pauperization and the decline in basic cultural abilities (i.e., reading and writing) occurred not only in most underdeveloped countries, but also in many developed countries. The result of this global trend inexorably facilitates the triumph of capital, as analyzed by Professor Banakas, at the expense of many people who are concerned by the effect of this situation in their daily lives. But where do we go from here in terms of law making? Admitting for a minute—as a postulate—that law should be the ultimate bulwark against the totalitarianism of capital, to whom should the task of law making be entrusted and under which form? Let us consider what each of the law makers' current legal literature proposes to our attention.

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27. *See generally* 1 J. ETHIOPIAN L. 26 (1964).

28. This being, for Ethiopia, a typically exogenous monist reasoning where the law provides one answer and one only to any legal question, that answer being found in a code leaving no power to the judge to err on the basis of justice.

III. WHAT ARE THE ALTERNATIVES TO GLOBAL LAW MAKING IN AFRICAN COUNTRIES?

When I prepared the first draft of my article, I did not realize that my African roots would finally push me into focusing on the continent where I was born, have spent one-third of my life, and have spent a considerable amount of time not only learning about its problems, but also listening to the experiences of young African lawyers with whom I have conversed. I also did not realize, though I should have known it as soon as I learned of his participation in the symposium, that Professor Macdonald would provide the readers of this Review with one of his imaginative and seminal texts on a topic we have had in common for some years—legal pluralism. The following remarks will accordingly (1) focus on African reality and (2) carefully avoid stepping into Professor Macdonald's colorful approach, even though, from time to time, I allude to one or another of his wonderful formulations that are far more explicit than my clumsy ones.

My position starts with the following postulate: Law is made for the people and not the people for law. This may seem trite, but globalization is just the contrary of such postulate. It molds all people in one uniform legal structure upon the presumption that all women and men are identical and live in the same cultural, economic, political, and social environment. If this premise is true, long live globalization. My anthropological self, however, cannot accept it. Thus, it appears to me that building an alternative for law making in Africa must take into consideration what I would consider to be four fundamental parameters: (1) the considerable diversity of African societies; (2) the highly socially-oriented psychology of Africans; (3) the aspiration they share with many people to know the law to which they are eventually subjected; and (4) the absolute need for Africa to be a distinct part of the global world and to use law in order to fight globalization.

A. The Parameter of the Considerable Diversity of African Societies

Unless one adopts from the start the idea that law must be uniform for all the abstract entities that make up the African "sujets de droit," African diversity necessarily implies legal pluralism, whether it is moderate or radical legal pluralism or possibly a mixture of both. Here, perhaps, a word of clarification is required for readers of this Review who are not familiar with pluralist readings of law systems.

A pluralist view of law requires one to distinguish between law and laws—between a single global law that "embraces the totality of a group of items" (in this case, the items may be called "legal relations") and a plurality of laws. This distinction operates on the assumption that individuals are the focal point of many laws. In an attempt to avoid overlap with the contribution of Professor Macdonald, one of the best known theoreticians and exponents of the doctrine of legal pluralism, I will say only that if such a conception of law prevails as to the kind of product we wish to relate with law making in a global world, it will apparently require an approach quite different from that adopted by a majority of those who have dedicated their lives to research and teaching in the field of law.

The challenge resulting from pluralistic conceptions will necessarily move them to a field of much greater doubt than the one they already entertain in the common law world with respect to the predictability of supreme court decisions. Indeed, when the members of a supreme court express and argue quite different points of view as to the solution to adopt or as to the motives for which to adopt a specific solution, is it not fundamentally a legal pluralism of some kind? Of course, at the present time, the pluralistic potential of the situation is annihilated by the majority rule. But everyone knows that some minority opinions are often the starting point of a future majority decision. Yet a further step can still be taken: that advocated by critical legal pluralists, who suggest that one should potentially consider as law what the people declare is law in their mind. This is the radical pluralism Professor Macdonald pleads for and to which I myself subscribe. This approach reflects the growing desire of many citizens to define their legal relations in their own words and in accordance with their own values. By so doing, they move from a status of subjects to the law to one of law makers. So-called "alternative" ways of settling conflicts open up a *terra incognita*, the exploration of which will be quite difficult for the interested scholar. In fact, the scholar's potential qualms will be settled by the admission that these new legal processes as such—as well as their outcome—almost completely escape his field of study and teaching, while what was until recently considered by him as being "the" law is now only a part, and possibly a small or very small part of what happens in the legal life of the population.

History and the present show us that such a conclusion is not new. On the one hand, in the field of history, colonial situations of all kinds (Europeans colonizing Africans, Amerindians, Asians, or their fellow Europeans) have come to realize that the law they imported as an exogenous law often became but a law on the books

and not that of the dominated population. The latter rapidly developed, on a traditional basis or in new ways, legal systems parallel to the official one that partially or completely escaped from the officially recognized single legal system in force. Today, it is sufficient to look at the practice of international commerce and arbitration and to realize that this is a world of ad hoc solutions reached by very specific procedures that depend on the will of the parties. But there is no need to go international. The press is quite regularly mentioning that parties to litigation "have settled out of court." In a compromise between parties, the process utilized and the conditions considered are generally unknown. However, it is very unlikely that the compromise failed to rely upon the "normal" basis as stated in ordinary State legal procedures and rules that are easily found in statutes or court decisions. Thus the laws applied in most States are already plural. This occurs in many situations when States take into account the personality of the parties and shatter the myth of equality in front of the law. In such cases, States allow what some have called semi-autonomous legal fields to operate within the limits they define. This is all trite once one admits a pluralistic conception of law, but it needs to be kept in mind when contemplating law making.

Beyond that first conception of legal pluralism comes that which perhaps most theoreticians advocate nowadays. According to Belley,[29] who is one of the strongest proponents in Canada and one of several classical authors of the first half of the twentieth century (Ehrlich, Romano, and Gurvitch are others), legal pluralism supposes an adjustment between structured legal orders to which individuals belong whether or not they are State organs or subsidiaries. This is the case, e.g., for businesses, corporations, trade unions, churches, and criminal gangs even if very few contemporary theoreticians of legal pluralism are willing to consider the case of the mafia in their studies.[30] A big step has been taken towards extending pluralism in this case since the co-existing fields of law with which individuals are confronted are no longer necessarily subjected to some kind of State control (the example of the mafia is particularly interesting on that count). The adoption of such conception of legal pluralism necessarily asks for a reassessment of the notion of legal order as it leaves the safe ground of the positivist, State-referring conception of law.

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29. *See* Jean-Guyy Belley, LE CONTRAT ENTRE DROIT, ECONOMIE ET SOCIÉTÉ (1998).

30. Santi Romano, one of the most advanced writers on legal pluralism in early 1918, was one theoretician who considered the case of the mafia.

Yet critical or radical pluralists consider that the everyday analysis of social relationships goes much further than either private settlements, which are governed by the more or less imperial aegis of State authorities (whoever they are), or the institutional contractual pluralism that Belley advocates. This view completely reverses the focus of pluralism because it centers upon the multiple and complex personality of the individual, who is then considered a genuine law maker. Yet critical or radical pluralists do not claim any kind of monopoly in the production of law. They believe, as I do, in a pluralist pluralism. Thus a pluralist reading of law does not mean that one excludes all existing sources to the benefit of a single one—stating the only law to be that stated by the people concerned according to the formula used by Tamanaha.[31] The worst thing for a pluralist when contesting monism would be to turn himself monist and disclaim any validity to other conceptions. The pluralist only asks for a wider look at how law is being made in society. He does not ask for a monopoly in favor of the perception of law he develops at the level of individuals, who are seen by him not as pure subjects of a law made by the State and its organs, but as law makers.

For African countries, I would plead, as I did rather shyly seven years ago, for an accepted (what I like to call a consociational) pluralism. This means essentially reaching an agreement between the various cultural, economic, political, and social components of societies in order to soften to a maximum the weight in the kaleidoscope of yellow, cyan, magenta, and black—colors of monism, centralism, positivism, and prescriptivism,[32] which are the current characteristics of State law. Because the State is still an unquestionable part of the world's organization, there is no question that it must be eliminated even though the world's organization may appear unsatisfactory in many circumstances. But it is clear that Professor Macdonald's four colors must, in as many places as possible, be replaced in order to effectively give way to what people think the law is or should be. This approach is necessary to satisfy people's expectations.

In that law making activity, the State would use Macdonald's traditional way of expressing the law: legislation which is green in Macdonald's prism and in my African kaleidoscope. What seems important here is the scope the State gives to its role in society. I would like to risk presenting the idea that, wherever the State's

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31. Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J. L. & SOC'Y 296, 313 (2000).

32. *See* Roderick A. Macdonald, *Unitary Law Re-form, Pluralistic Law Re-Substance: Illuminating Legal Change*, 67 LA. L. REV. 1113 (2007).

intervention is not needed and other law makers exist, the State should refrain from intervening and abstain from indulging in law making. This leaves the State wide discretion in its actions but excludes it from most conflicts, regardless of whether they involve individuals alone or criminal matters that can be solved through more traditional ways. These conflicts should not be regulated from top to bottom or by punishment as prescribed in criminal legislation. Instead, they should be resolved by those mechanisms that lead to the re-establishment of social harmony. If the amount of legislation and the determination to cover every single aspect of social life increased regularly, then this attitude of the African State would take a completely different direction than the one adopted by many States of the world in recent decades. As a result, the number of statutory enactments (and in some cases the poor quality of their drafting) would defeat their very purpose, as no one, not even the average educated citizen, could easily access their contents. Quite on the contrary, Africa would follow the most recent trends in the Northern Hemisphere, which are characterized by a more or less radical pluralism and by mediating procedures that emerged partly as a reaction against the suffocation of the law by legislation. Finally, such attitude would be the only one that respects the huge diversity of the African continent and each of its component States.

A problem that all legislators face, but which is particularly acute in Africa, is conveying in an adequate way the State's will to the populations when they need to be informed about the contents of the law. In Africa, the matter is further complicated by statutes that are drafted mostly (if not exclusively) in a European legal language when a considerable part of the population is either illiterate or has absolutely no knowledge of that foreign language. In these circumstances, how can the citizen appropriately respect the law as made by the State? Since the early 1970s, I have been pleading for the use of alternate means of publicizing the law in Africa: the "translation" of the contents of official gazettes into plain language proclamations in public, songs, theatre plays, cartoons, movies, and so on. These were, in my view, the only ways of ensuring that legislation was absorbed by those to whom it applied. Needless to say, I have been preaching in the desert.

In my view, things are even worse when the population at large is invited to participate in the law making process by approving (oddly enough it rarely—if ever—disapproves) not any statute but the fundamental law of the land in the form of a constitution. This is all a sham of a democracy as the voters do not understand a word of what they are told to approve. The draft is rarely—if ever—translated into the many vernacular languages (or at least in

one) of a country. This was contemplated some years ago in the Congo[33] when the Sovereign National Conference, presided by Manager Monsengwo, decided to translate its constitution into the four national languages of the country: Kikongo, Lingala, Swahili, and Tshiluba. Of course this was an impossible task if the text was not put into a simpler vocabulary because these four languages did not have equivalents to constitutional concepts, such as sovereignty, parliament, or jurisdiction. I did the work in French, but, to the best of my knowledge, it was never translated into any of the four languages considered. It is highly doubtful that such an attempt would have been successful. Having done it purely for the sake of the challenge, I at least have no qualms about a possible unjust enrichment on my part.

In conclusion, the place I would keep for the green in my own African kaleidoscope would be limited and well-defined.

B. The Parameter of the Highly Socially-Oriented Way of Life of Africans

At this stage, a fundamental decision should be made as to where to place the fundamental principles that are presently incorporated in bills, charters, or declarations of rights. Up to now, these have been conceived by America or Europe and introduced by various means into Africa. Yet it is not necessarily convincing that they match the conceptions of law on the continent (or in other countries with similar approaches to law).[34] The necessity to some of these exogenous principles in order to justify, e.g., financial or technical assistance is remindful of the civilization paradigm of the colonial period. This is not a plea against such principles, but simply raises the question of whether or not there is validity of globalization in that particular field of law.

When I refer to people, I assume that such a reference encompasses more than just one person. In a most interesting essay, Kasirer hinted that there could be a one-person-law.[35] Not wishing to enter such a discussion here, it suffices to say that

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33. I have since learned by chance that one of the former Liberian constitutions was likewise "translated" in plain language, but I do not know if this was for the purpose of a referendum. Both versions were, at a time, available in the CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A.P. Blaustein & G.H. Flanz eds., 1974).

34. *See* CULTURE AND RIGHTS (Jane K. Cowan, Marie-Bénédicte Dembour & Richard A. Wilson eds., 2001).

35. Nicholas Kasirer, *Le Droit Robinsonien, in* LA STRUCTURE DES SYSTÈMES JURIDIQUES [The Structure of Legal Systems] 195–230 (O. Moréteau & J. Vanderlinden eds., 2003).

people agree to govern temporarily or permanently (for whatever that means) an existing relationship between them, and this relationship may be considered the law under which their agreement stands. What is commonly excluded from the law in the actual setup, i.e., the gentleman's (or gentlewoman's—why not?), agreement is that it is law and should be respected. The more so because such agreement will, in many cases, reflect a common sense of what is just for both parties far beyond the technicalities required by the law on the books.

If, in that perspective, we transfer to the classical theory of the sources of law, we meet an unknown character: the contract. Every single civil lawyer has been trained in the view that contracts (or, in the language of the French Civil Code article 1134, "conventions"), although they "make the law of the parties" ("font la loi des parties" in French), do not make law—and thus are not sources of law—in the sense we have been using the expression in this symposium. They create only subjective rights (note the plural), not law (note the singular). This perspective has been challenged,[36] especially since "conventions" are easily considered sources of law if they are passed between collectivities like trade unions and business organizations. What is good as a collective agreement does not exist between individuals. In a critical or radical pluralist perspective, such distinction is inconceivable. Thus I would definitely be tempted to introduce conventions between individuals among the sources of law.

The use of the adjective "just" in the last sentence of the paragraph before the previous one is far from meaningless. It goes back to the idea that necessary fairness is an essential quality of any law. It also goes back to the concept of justice, which Professor Banakas has highlighted in his article,[37] and thus to values, which would correspond to a second color, or rather a non-color, that of white, representing the super-eminent principles in our kaleidoscope. These principles play a fundamental role in legal change—many would say in legal fluctuations—today. They are necessarily vague concepts that require an interpretation by the judge. These principles are embedded in constitutional enactments of such importance that they are no longer "amendments," like in the U.S. Constitution, but rather are like a "charter." Yet one

36. *See* Jean-Pascal Chazal, *De la signification du mot loi dans l'Article 1134 Alinéa Ier du Code civil*, 100 REVUE TRIMESTRIELLE DE DROIT CIVIL 265 (2001).

37. Stathis Banakas, *A Global Concept of Justice—Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today's World*, 67 LA. L. REV. 1021 (2007).

would not consider them as case-law because the judge is not supposed to "make" the principle but only to specify its field of application. Jestaz calls these general principles "a mysterious entity."[38]

When considering law making in Africa, it is important to understand that the general principles deal more with adjective problems (law as a process) than with substantive ones (law as a catalogue of solutions). The main super-eminent value may be the necessity of harmony within society. The consequences that flow from this fundamental principle include, among many: (1) re-establishing broken harmony, which requires a collective process in order to reach the deepest truth about the reason the breach occurred; (2) the collective process that takes time as it involves an in-depth exploration of everything that is relevant to reach a satisfying truth—exposure that not all involved parties will be ready or able to face; (3) once a satisfying truth is reached, another delay will result from the collective construction of a satisfying way of mending the unraveled seamless web of social life. These consequences will lead, finally, to reconciliation. This is not "African" justice as "administered" for decades by colonial administrators, who visited and controlled "native" courts and eventually adjudicated ten or more cases a day. It also is not national (i.e., global) justice as dispensed in the following decades by post- (which is preferable, but identical in this case, to neo-) colonial justice.

Assuming that, in a pluralist perspective, people will be confronted, as they are today, with their own ways to settle their differences and that of the State (that they are prone to desert currently), State judges will necessarily be part of the picture, even if it is only to administer the parts of State law that will still be operational. But, insofar as they are confronted with the main bulk of the population, they would have to be of a kind other than the current one. This last consideration brings into the picture the necessity to mentally decolonize the mind of so many lawyers in Africa through a re-appropriation of the roots they share with the majority of their compatriots. Truth and reconciliation is also on the agenda in this instance. Such mental decolonization should also pass—at least for the upcoming generations of judges—through a fundamental reassessment of their current education, which is still closely modeled on exogenous programs of teaching.

38. Phillipe Jestaz, *Source délicieuse*, 92 REVUE TRIMESTRIELLE DE DROIT CIVIL 73, 76 (1993).

Whatever organization of the curriculum one adopts,[39] it seems that an indirect, but more importantly a direct contact with justice, as perceived and attained by the populations, will have to be included in the curriculum.[40] As for the existing judges, why not organize for them, *mutatis mutandis*, the same kind of direct contact with the law as practiced by the populations and as Hesseling organized for law professors in Mali.[41]

Everyone knows how great knowledge can be as a tool of power. Everyone knows that those who recognize the importance of this tool[42] play an important role in the law making process. Even if legal theories about the sources of law are prone to diminish, if not deny, their role as law producers, the latter is often determinant in the background. The *Professorenrecht*[43] is indeed far from being confined to the walls of law faculties, but there is no need to elaborate on this point. In African tradition, the role of knowing elders has so often been mentioned that it is obvious. In a pluralist non-hierarchical view of the sources of law, it has to be brought into the picture.

Last, but not least, in our kaleidoscope comes the blue of custom. What is it made of? Custom in general is essentially the perception of a way to behave and, as a source of law, a common perception of how to behave in accordance with the other members of society. Custom is typically expressed in most of Africa by the answer: "We always have been doing so." There is accordingly no reference to revelation (the law as expressed in the word of God), legislation (the law as expressed by the ruler), case law (the law as expressed by the restorer of harmony or the adjudicator), the convention (the law as expressed in the agreement with the other party), or legal knowledge (the law as expressed by the learned). Custom is not word or writing; it is gesture. As soon as it is either word or writing, it ceases to be custom as directly perceived by the individual. This is why (although, in a distant past, I have

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39. The American and Canadian curriculums, with the exception of Quebec, require a bachelor's degree before acceding to law; the European curriculum has no such requirement.

40. For an example of such an approach, see Jacques Vanderlinden, *Enseigner sans reproduire—Rénover sans tout détruire: Propos hétérodoxes au départ de quelques constats élémentaires*, *in* LES DEFIS DES DROITS FONDAMENTAUX 423 (J.Y. Morin & G. Otis eds., 2000).

41. *See* Hesseling et al., *supra* note 20.

42. This category is not restricted to law professors; it includes experts of all kinds but also all sorts of individuals or organizations contributing to the dissemination of law on the basis of the assumption that "they know better."

43. For example, in the context of German legal history, the "professors' law," which was developed in the law faculties during the second half of the nineteenth century.

succumbed to the temptation of writing it down under various forms) I object to the drafting of custom. Such drafting too often results in a static image to which one clings while behaviors change. The result is even worse if the written-down custom receives some kind of official status.

In the course of the last few decades, African customs have changed and proven their capacity for adaptation to new circumstances. The most striking example—as mentioned earlier in this article—is the case of urban customs: Some people follow urban customs for parts of their daily lives, while behaving according to their rural custom for other parts. The image seen when the kaleidoscope is turned to view their different customary selves can be very different depending on the particular situation. The worst thing one could do in such evolving situations would be to globalize them into a well-defined status, like it was done in the past in civil law colonial territories. The colonial territories were, in that respect, quite different from the common law regions where the courts focused on each situation with all its peculiarities and decided which law (customary, religious, or State) provided the best answer to the case in accordance with what the parties expected from their transaction.

The last component of the highly socially-oriented way of life of the Africans is religion. This component, though the last discussed, is certainly not of least importance, especially since it has a direct bearing on law making. Though Africans had a rich and diverse array of founding myths explaining the origin of the universe and, of course, of men as they currently are, African societies also had religions, which, in their globalizing, "civilizing" fad, the Europeans called superstitions.[44] But the task of disseminating "civilization" was mostly entrusted to Christian missions through education at all levels; this was evidently accompanied by the propagation that theirs was the only possible faith, in the same way that, centuries before Europeans scrambled for Africa, Muslim influence was established on the northern part of the continent through the Sahara and down roughly to the tenth parallel. This Muslim influence resulted in many Africans converting to Islam. Consequently, with reference to monotheist religions of the Book, Africa is certainly the continent with the largest number of religious-minded persons.

But as the colonizing powers of the twentieth century more or less respected these creeds and even in some places gave them a privileged place in the colonial setup, they were not able to fully

44. They never realized how many of their own religious beliefs could be so qualified.

repress all the cults that proliferated in many places. These cults developed after independence. For some of them, they still represented an organized stable structure in the general disarray of economic, political, and social crises. For others, they represented the promise of ultimate justice, if not in this world, at least possibly in the next one. On top of these institutional trends, all sorts of individual "preachers" appeared who derived a direct benefit from the Africans' need for some hope in their current misery.

From the time of colonization onwards, constituted "churches" have made up powerful pressure groups on governments, and this is still true today. Their pressure includes, as in other parts of the world, clear manifestations of what they want the law to be. Such action is the more important as it often concentrates on family relations, which are the most current legal relations for the majority of the population. The role played by the churches is also the more important as some of them are particularly strict and determined as to their role in the governance of the everyday life of Africans, even if their stand is radically opposed to some features of African marriage that are in direct conflict with their beliefs; such is the case with monogamy, which is fundamental in the eyes of most churches. For these churches, there is often no question of legal pluralism in Africa, even if they cannot avoid it in other parts of the world.[45] This does not mean that tensions do not exist in the current legal life of Africans, especially in family and successions issues between official, canon, or customary law. These tensions have to be taken into account when contemplating the African legal landscape. Religion and God's law are definitely part of the highly socially-oriented African way of life.

C. The Parameter of the Aspiration to Know the Law

If it had not been for the aping or the innocent belief that the minute you had a code not only did the law change on the books, but also in the lives of the citizens, then the supporters of codification in Africa could have been convinced that it was useful insofar as Bentham's famous phrase expressed an evident truth, which it does not. Bentham's phrase reads as follows: "The principle of justice is, that law should be known by all and, for its

45. *See* Jacques Vanderlinden, *Une lecture du système normatif de l'Église catholique par un pluraliste comparatiste aux personnalités multiples*, 50 McGill L.J. 809 (2005).

being known, codification is absolutely essential."[46] If one can easily believe, on the basis of reasonably strong evidence, that the will to improve the knowledge of the law is a leading factor behind codification,[47] then experience shows that such will is more wishful thinking than fact; far more than reality, it represents a quest for perfection in the expression of law for the completion of which no Galaad[48] has yet been found.

In Africa, the problem of a perfect knowledge of the law by the populations arises the less as, for a long time and today, for many people, the law is still formulated through custom. The best possible knowledge of law available to all members of a given society can only be realized through that specific source of law. From the very beginning of a person's existence, custom is embedded in his life and its knowledge grows with age and intermingling with the group's cultural, economic, political, and social behavior.

The introduction of writing and formal education by the colonizer has altered this perspective of custom. The active transfer of law through custom has been challenged by an oral transfer of legislation, case law, or legal science; but the latter has unfortunately (or fortunately as some would say) proven quite ineffective for various reasons. Among the reasons for the ineffectiveness is the fact that legislation, case law, and legal science were nearly always formulated in a doubly foreign language, that of the law and that of the colonizer. I have dealt with this problem before and would like to mention one of its facets pertaining more specifically to custom, i.e., the problem of writing it down in order to have it better known. There was a strong movement in that direction in the late 1950s to early 1960s,[49] as well as in British, French, and Belgian Africa.

It took me nearly thirty years to realize how wrong I was in advocating the drafting of Congolese customs.[50] The minute you write down your impression of what custom is, you kill it. It loses

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46. 10 THE WORKS OF JEREMY BENTHAM 581 (John Bowring ed., 1843). *See also* Jacques Vanderlinden, *Code et codification dans la pensée de Jeremy Bentham*, 3 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 4 (1964).

47. *See* Jacques Vanderlinden, LE CONCEPT DE CODE EN EUROPE OCCIDENTALE DU XIII^{E} AU XIX^{E} SIECLES (1967).

48. In Germanic mythological tradition, Galaad is the brave and pure knight of the Round Table who is the first to be allowed to contemplate the Holy Grail.

49. *See* Jacques Vanderlinden, *Vers la rédaction des droits coutumiers congolais*, *in* LA REDACTION DES COUTUMES DANS LE PASSE ET LE PRESENT 233 (J. Gilissen ed., 1962). *See also* Jacques Vanderlinden, COUTUMIER, MANUEL ET JURISPRUDENCE DE DROIT ZANDE (1969).

50. *Le juriste et la coutume, un couple impossible?*, *in* ACTES DU CINQUANTENAIRE DU CEMUBAC 249–50 (1988).

its essential character, which is the idea that custom is constantly changing in accordance with people's behavior. You may have made an excellent photograph of it, but there are the following problems: (1) it comes out of your personal prism with all the distortions it is likely to produce; and (2) it is a static view that is rapidly outdated. As for the argument that the drafting increases the knowledge of custom, it must be qualified as it is far too absolute. In fact, the drafting or codification of custom does not concern the people most interested—they know their custom as they live it and constantly adjust it to their changing environment—but only the civil servants or "learned" judges who are challenged by their ignorance of it and cannot accept appearing more ignorant than the ones they rule. This is true in Africa as it was true in England in the early fourteenth century when justices were attempting to draft the customs of Kent and were met with an evasive answer.[51] Let people make their law collectively through their daily behavior. This is what they consider the law to be, and it is their belief that should matter if one pays more than lip service to critical or radical pluralism.

D. The Parameter of the Absolute Need for Africa to Play a Part in the Global World

In his opening seminal contribution to our symposium, Banakas convincingly demonstrated that one cannot do much against the kind of global world the capital needs to satisfy its ever-growing "natural" and irrepressible development. Yet he also indicated that lawyers were among those who could contribute to the alleviation of the impact of globalization on populations. If one accepts these premises, African lawyers (and possibly lawyers interested in Africa's future) have to play a role in the building of the defenses law can eventually use to try to oppose to the havoc brought by wild capitalism to the cultures, economies, political institutions and social fabrics of the continent. Africans and their friends all over the world also have to develop their abilities in mastering the legal tools used in globalization and turn them against their formidable opponent.

This will essentially operate at the State level through the making of a law that will be totally different from the one described in the preceding pages of this article. Such is the sacred trust States should exercise on behalf of their populations. Unfortunately, this is not the case and, in the past fifty years, the

51. 5 THE EVRE OF KENT OF 6 AND 7 EDWARD II (1313–1314) 50 (F.W. Maitland, L.W. Vernon Harcourt & W.C. Bolland eds., 1909).

ruling "elites" have been more prone to plunder the common wealth than to be concerned with the welfare and future of their fellow citizens. There is no need to elaborate here on the overall corruption that plagues African States. Having been privileged to run the Chamber of Commerce and Industry of the Congolese capital in the first years of the Congolese independence, I have been a direct witness of how rapidly corruption infiltrated the local economy. This corruption is primarily the result of the influence of foreigners trying desperately either to pump their earnings out of the country or to gain new market shares in the few "juicy" sectors of economy that were still active. Africans, especially those in power at the top of the State, were quickly exposed to temptations to uniquely foster their own interests and to completely forget the population entrusted to their care. The population was abandoned, and it was these people who carried the brunt of the destruction of the local economy. This destruction, in turn, led to another kind of generalized, small-size, and lower level corruption that was closely linked to the need of thousands of people to survive. These people held some kind of negotiable power allowing them to compensate for unpaid salaries, the increasing cost of living, and monetary collapse.

If one wishes to start on a new basis someday, then action from the State will be needed. And, if such action can be obviously directed to the internal part of each country, then it necessarily also has to take into consideration the predominant role of outside influences on the country, whether those influences include capital, other States who can contribute in the building of a new approach to development, or international organizations where the role of these outside influences seems predominant. Even if such perspectives are far from encouraging, occasional signs are encouraging because those experiences show that there are ways to escape Africa's woes other than through globalization.

Unfortunately, not much is currently being done in the legal field. Yet a brief word needs to be said about the OHADA (Organisation pour l'harmonisation africaine du droit des affaires—Organization for the Harmonization of Business Law in Africa) as I have been somewhat critical about that institution in other writings.[52] I still do not believe, as some extollers of the organization, that the creation of OHADA, along with the huge resources at its disposal,[53] will bring an end to unemployment in

52. *See* Jacques Vanderlinden, *Quo Vaditis Iura Africana?*, 8 JAHRBUCH FÜR AFRIKANISCHES RECHT 145 (1997).

53. *See* Ohada, Le Portail du Droit des Affaires en Afrique, http://www.ohada.com/ (last visited Apr. 2, 2007).

West Africa, the region most concerned by OHADA's activities. I also have some reservations about the amount of money spent on what is a fairly small clientele—that of upper-level, economic, and preferably international operators—while no one seems to care about the state of justice for the overwhelming majority of the population. But I cannot deny that the organization, with its sophisticated structures, specialized schools or institutes, conferences, publications, and clubs, may be precisely the kind of tool needed to fight globalization. Yet I also fear—although I have no direct independent information on that point—that OHADA's action could be fully and discreetly recuperated by the capital (precise information about its finances would be interesting in that respect) and by international institutions that are definitely engaged in the globalizing process. The OHADA website hints in this direction when it says that OHADA exists "thanks to the support and direct involvement of the private sector and of international corporations," and that "given the great progress OHADA represents for the African economies and the high stakes of OHADA's success, [it] . . . quickly gathered nearly 100 major corporations dedicated to OHADA's dissemination and success."[54] Such statements do not alleviate my fears, even if OHADA has enthusiastically been supported by someone I know personally—Keba Mbaye.[55] This man chaired the International African Law Association and was a former President of the Senegalese Supreme Court and Constitutional Court, and a Judge at the International Court of Justice. Rarely in my life have I met a man of so many exceptional qualities and integrity, and working closely with him was a unique privilege. Obviously, he supported the unification of African positive laws, but I have difficulty believing that he was indifferent to the misery that globalization and capital, so heavily present in OHADA, could bring to African countries. I only hope that, one day, I will be able to fully appreciate the positive role that OHADA's policies and acts have played in fostering the absolute need for Africa to play a part in the global world in order to diminish, through law, the current unfortunate results of globalization for the average African.

54. *Id.*
55. He died on January 11, 2007.

IV. CONCLUSION

What precedes only conveys half a century of occasional notes, queries, and, first and foremost, perplexities about law in Africa.[56] As I am writing this article in the environment of a "global" world, I feel terribly outdated and look, more than anything else, like a relic from a distant past rowing desperately against the tide. Reaching slowly the term of a busy active life, the latter has taught me that the more those around me believe that I have managed to know something, the more I know that I know nothing. What is more, such embryo of knowledge—whether expressed orally or in writing—is constantly subjected to doubts of all kinds and magnitude. This is particularly true of what I could appear to know about Africa. But I try to keep intact my passion for the Dark Continent; slightly adapting to my own situation Unamuno's well-known dictum: "Life is doubt, doubt without passion is death."[57] These doubts appeared while I was in my third year of law school (law school for me was a total of five years). I had then been taught for slightly more than two years that law—like the Catholic Church, which embraced ninety percent of my fellow Belgian countrymen—was "one, holy, universal" (*unum, sanctum, catholicum*). Simultaneously, I realized, through personal research about codification, that the stele of Hammurabi[58] and the Joei Shiki-Moku[59] had much less in common with what I had been told and instructed to repeat at the exam if I was ever questioned about "what is a code." Ever since, doubts about words—especially those short three letters, one which is my professional toy—and the nature of things they try to describe has inhabited me. Could I, under such circumstances, end up being anything but a radical pluralist inhabited by doubt? Make mine—although with minimal changes—the final words attributed to Joan of Arc by George Bernard Shaw: "O God that madest this beautiful world of African laws, when will it be ready to receive many more pluralist lawyers? How long, O Lord, how long?"[60]

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56. My first article and my first book published shortly after graduation were devoted to African laws. My most recent article to be published soon in Paris deals with legal pluralism.

57. Unamuno indeed wrote: "Life is doubt, and faith without doubt is only death" in his SALMO II, POESIAS (1907) as published in his 16 OBRAS COMPLETAS 287 (1958).

58. I tried desperately through a careful reading of editions of the text in English, French, and German to find out what kind of "code" it was.

59. As published in the *Transactions of the Asiatic Society of Japan*, where it was called—as it still is in the Encyclopedia Britannica—a medieval "code."

60. G.B. Shaw, SAINT JOAN 163 (1932).